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CONFIDENTIAL AND PRIVILEGED LEGAL COMMUNICATION

January 6, 2020

Shaun Mulholland, City Manager
City of Lebanon
51 North Park Street
Lebanon, NH 03766

Re: "Welcoming Lebanon Ordinance" Binding Initiative Petition
Our City of Lebanon File No. 20158-47.015

Dear Manager Mulholland and other City officials:

You have requested my legal opinion concerning the substantive legal validity – if adopted – of the "Welcoming Lebanon Ordinance" recently submitted to the Council by binding initiative petition under § C419:23a of the City Charter. (This letter does not cover procedural issues, which I have discussed elsewhere)

SUMMARY OF OPINION

It is my opinion that there is no fundamental legal flaw in the first five provisions of the proposed ordinance – subject, however, to the three implementation concerns discussed in Section D of the discussion below, and subject to the ***caveat*** that this opinion is based on very recent case law, primarily from the 9th Circuit, which could potentially be overturned in the US Supreme Court, and if it were, the proposed ordinance would become unenforceable.

It is my view that the "Provision 6" has a high likelihood of being held unlawful, for the reasons given in Section E of the discussion below.

DISCUSSION AND BASIS FOR OPINION

A. Content of the Proposed Ordinance: The version of the proposed ordinance text addressed by this opinion is the one which appears at pages 161-162 of the Council's Agenda Packet for January 8, 2020.

The first five sections would (if adopted) list a number of actions which the City's "agents" – an undefined term in the draft, but whose common meaning would include all employees and officials when acting in their official capacity – would be ***prohibited*** from doing, including:

- "Profil[ing]," target[ing], or "collect[ing] any information" about any person on the basis of race, ethnicity, language, religion, citizenship or immigration status.
- Requesting or collecting any information concerning any person's immigration status (which an exception for when that information is relevant to "an administrative proceeding in which the City is or may be a party").
- Disclosing information about any person's citizenship or immigration status, unless authorized by the person involved, mandated by "legal process," or when necessary for an ongoing investigation of a non-immigration-law related felony.
- Conditioning any City service or benefit on citizenship or immigration status unless required to do so by state or federal law.
- Participating in or aiding immigration enforcement actions, including making arrests, assisting Federal immigration authorities, giving Federal authorities access to City-detained persons, allowing use of City facilities by such Federal authorities for immigration-related investigations, or sharing information with such authorities.

The sixth section of the proposed ordinance is the only one which creates an ***affirmative*** duty on the part of City agents – namely the duty to "immediately act to inform residents of the City" when they become aware of the presence of Federal immigration authorities within the City.

Violations of any part of the proposed ordinance would constitute a "violation" as defined by the NH criminal code.

B. State Law Authority. It is my opinion that the first five sections of the proposal (I will discuss the sixth section separately below) come well within the City's enabling authority under RSA 47:17 to enact ordinances for the City. Those five sections do not involve the City embarking on any new enterprise or function, but merely set forth types of actions which City agents who are already engaged in other (presumably lawful) actions on the City's behalf are prohibited from taking.

The legal question thus becomes: Is there any state law ***mandating*** the City to take the types of actions which these 5 sections prohibit. I do not find any such mandate. In the realm of police departments, for example, no N.H. municipality is mandated to have a police department at all (and some do not). And for those municipalities which do have such a department, the law supports the authority of local policy-making authorities to determine – through the local budgeting process and otherwise – which law enforcement functions local resources will be utilized in support of, and which they will not. In the NH Supreme Court case of *Blake v. Town of Pittsfield*, 124 N.H. 555 (1984), the Court upheld a town's selectmen in terminating a chief of police "for cause" on the basis of overspending the budget. The chief's claim that the additional amounts were necessary in order to provide "required services" was held to be not valid excuse for ignoring the budgetary votes of the town. Every appropriation decision is also a policy decision involving not just an amount of money, but the ***purpose*** of the authorized expenditure (*see* definitions in RSA 32:3). Even aside from the issue of overexpenditures, RSA 105:2-a makes the supervisory decisions of a chief of police subject to the "written formal policies" of the appointing authority. Thus the City's policy-making officials have authority to determine, for example, what areas of a community will receive regular patrolling and enforcement and which will not – or, in this case, that certain types of Federal laws will not be enforced by City personnel.

Importantly, there are a number of states in the US which, since the beginning of the Trump administration, have enacted state laws outright prohibiting municipalities in those states from enacting ordinances similar to the one under consideration. However New Hampshire does not have such a state law. The NH Legislature expressly considered such a prohibition as part of HB 232 of the 2019 Session, but it was defeated. (Of course there is always the possibility that such a prohibition might pass in the future. If that occurred, my opinion would of course have to be altered.)

C. Federal Law. The status of federal law is less straightforward than state law. ***On its face***, federal statute law appears to prohibit ordinances such as the "Welcoming Lebanon Ordinance." Specifically, 8 US Code § 1373 and § 1644 prohibit both state and local authorities from enacting laws or ordinances restricting local communications or cooperation with the Immigration and Naturalization Service. However as of the date of this opinion, case law has so far held that those statutes are effectively negated by the 10th Amendment to the US Constitution (the one that says all powers not conferred on the federal government are reserved to the states).

The currently-most-authoritative decision on this subject (albeit one which is at this time subject to a petition for review by the US Supreme Court) is *United States v. California*, 921 F.2d 865 (9th Cir. April 18, 2019). At issue were certain California ***state laws*** limiting the extent to which state and local authorities could cooperate with federal immigration authorities (similar to the Lebanon proposal). The state laws were ***upheld*** by reference to the 10th Amendment.

The Trump Administration argued such laws violated the principal of "intergovernmental immunity" – under which both federal and state/local governments are prohibited from ***actively interfering*** with each other's functions. But the Court held that the state law at issue did ***not*** require any such interference, but merely kept state and local governments out of participating in certain federal functions. The Court acknowledged that federal immigration enforcement was made more difficult by these laws, but withholding cooperation is simply not the same as interference or obstruction.

That conclusion was bolstered by consideration of the 10th Amendment – which under prior US Supreme Court decisions (*see New York v. US,* 505 US 144 (1992) and *Printz v. US*, 521 US 898 (1997) has been held to establish an "anticommandeering rule" – which means the federal government cannot compel state or local governments to expend local/state resources (cannot "commandeer" those resources) for the purposes of helping to implement a federal law. The Court in the *United States v. California* case held – for purely technical reasons – that 8 US Code § 1373 and § 1644 were not in fact violated by the state laws at issue. However other federal court decisions have held that those sections are outright unconstitutional due to the "anticommandeering" rule of the 10th Amendment, *see City of Chicago v. Barr*, 2019 WL 4511546 (Sept. 19, 2019); *City of San Francisco v. Sessions*, 349 F.Supp.3d 924 (2017), affirmed 897 F.3d 1225 (2018).

> [I want to re-emphasize that the *US v. California* case may be taken up by the US Supreme Court, and of course could be overturned (although it is notable that the 10th Amendment "anticommandeering" rule is one developed primarily by more conservative justices in the past, and the Supreme Court is arguably even more judicially conservative today). New Hampshire is of course not directly governed by 9th Circuit decisions. However I have found no similar 1st Circuit decisions.]
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> [It is also worth noting that the courts have – so far – taken a different tack on the question of whether the Federal government can withhold certain grants or aid from cities which have enacted ordinances similar to the Welcoming Lebanon proposal. The 9th Circuit held in *City of Los Angeles v. Barr*, 929 F.3d 1163 (July 12, 2019) that there was nothing constitutionally wrong with the Federal government conditioning certain grants to cities on those cities' cooperation with immigration enforcement – although there are also cases holding that the president alone has no authority to attach such "strings" to Federal grants, *see, e.g., City of Philadelphia v. Sessions*, 309 F.Supp.3d 289 (2018).]

In summary, as of the date of this opinion, I see nothing fundamentally unlawful about the first 5 sections of the proposed ordinance. Although federal statutes prohibit such ordinances, case law as of this date holds those statutes preempted by the 10th Amendment. Clearly a US Supreme Court decision could potentially reverse that conclusion. But if that happened, the ordinance would simply become unenforceable. I foresee no particular legal risk to the City from having assumed the provision was valid unless and until a court rules otherwise.

D. Implementation Concerns About The First Five Sections: Even though, as laid out above, I see no fundamental flaw in the first 5 sections of the proposal, I would note the following, concerning their implementation:

1. The first general concern arises from the unusual fact that the only persons subject to this ordinance would be City officers/personnel, ***and*** that the only persons who would be ***enforcing*** the ordinance would also be City personnel. A police department, for example, may naturally be reluctant to bring enforcement actions against its own members under an ordinance such as this – particularly for violations which may seem to be "minor." For this reason, and also because portions of the proposed ordinance leave quite a bit of ambiguity, I would strongly recommend, if this proposal is enacted, that the City consider developing a set of implementation and enforcement guidelines, aimed at making enforcement as uniform and impartial as possible. Otherwise there could be a risk of discrimination or Equal Protection claims.

2. A specific example of ambiguity is found in "Provision 1" of the proposal, which prohibits agents of the City from "collect[ing] or retain[ing] information… on the basis of race ethnicity, or language…" (in addition to the basis of citizenship or immigration status which are the main focus of the proposal). Let's suppose you have a police incident report which says, "The victim reported that the assailant was Caucasian, in his 30s, and spoke French." Does that report violate the prohibition on collecting information "***on the basis of***" race and language? That's unclear. If the report also said "the victim believed the assailant was probably a citizen of France," that arguably would violate the intent of the proposed ordinance, but again it's not clear. If I were drafting this proposed ordinance from scratch, I would try to make it less ambiguous. Given, again, that the only persons enforcing this provision are likely to be City personnel, I would recommend – if the proposal is adopted without alteration – that the City adopt some implementation guidelines which address, among other things, how such ambiguous provisions are going to be interpreted.

3. A third implementation concern arises from the fact that the proposal applies broadly to all "agents" of the City. It's possible to imagine circumstances where literal interpretation of the proposal might interfere with someone's First Amendment rights. Suppose, for example, that a member of the Recreation Commission were to feel strongly about immigration enforcement and chose to share some immigration status information with Federal officials – information, let's say, which was unrelated to, and not learned in, that member's official City capacity. First Amendment rights might arguably be involved. Please understand, I am not raising any basic flaw in the proposed ordinance itself; I'm merely raising a caution that there may be circumstances where it might not be enforceable in a literal way, due to the "agent's" constitutional rights. Each such case would turn on its unique circumstances.

E. Provision 6 of the Proposal. As observed earlier, this is the only provision which requires an ***affirmative*** act on the part of City agents – namely a duty to "inform residents" of the City if any federal immigration authorities are present in the City. I recommend ***against*** the adoption of this provision, for two reasons:

1. First, the affirmative duty is defined in such vague terms that it would be impossible for any particular City agent to determine when or whether it had been complied with. The text of the proposal says that City agents "shall immediately act to inform residents…through any reasonable means and channels available." But no particular reporting procedures are given. What does "immediately" mean? Who determines what channels are "available." Whose job is it to take the lead and determine when this duty has been met, so that other City agents no longer need concern themselves? Further, which residents of the City have to be

informed? Presumably the aim is to protect persons who have some uncertainty as to their immigration status. And yet, due to the other provisions of the proposal, the City would be prohibited from collecting information about who those people are. In, sum, this section of the proposal is too vague to be enforceable.

2. Perhaps more importantly, it my opinion this provision has a strong likelihood of being held to violate the "noninterference" principle which is part of the intergovernmental immunity discussed in Section C above (and is a principle that dates all the way back to *McCulloch v. Maryland*, 17 US 316 (1819)). That principle prohibits state and local government from "actively interfering" with a Federal function (*see U.S. v. California*, 921 F.3d 865 at 880, and cases cited therein). Although I have found no specific case dealing with local officials actively warning citizens against Federal officials, it is my view that there is a strong likelihood that such warnings would be held to constitute obstruction of a Federal function.

> [***Note:*** It is true that one of the California provisions upheld in the *US v. California* case was a state law requiring ***private employers*** to inform employees prior to federal immigration inspections of the workplace. It is conceivable that the petitioners in this case construed that case as a green light for imposing such a notification requirement on the City itself. But the "noninterference" principle only governs the relationship between ***levels of government***, hence the two situations are in no way analogous.]

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Please do not hesitate to get back to me about any aspect of this opinion.

Sincerely,

H. Bernard Waugh, Jr.

cc: Paula Maville, Deputy City Manager